APPENDIX A

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1680

September Term, 1972

THE SEVEN-UP COMPANY, a corporation of the State of Missouri, *Appellant,*

vs.

ANDREW C. GOODHOPE, Hearing Examiner; MILES W. KIRKPATRICK, Chairman; PAUL RAND DIXON, Member; A. EVERETTE MACINTYRE, Member; MARY GARDINER JONES, Member; DAVID S. DENNISON, JR., Member, and The Federal Trade Commissioner, *Appellees.*

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

May 31, 1973

Costs taxed in favor of Appellees:

Costs of printing 25 copies of Appellees' brief: $208.23.

Total costs of Appellees for recovery from Appellant in the U.S. District Court, $208.23.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, 8th Circuit
ROBERT C. TUCKER

June 26, 1973

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1680

Appeal from the United States District Court of the Eastern District of Missouri.

THE SEVEN-UP COMPANY, *Appellant*,

vs.

Federal Trade Commission, MILES W. KIRKPATRICK, PAUL RAND DIXON, A. EVERETTE MACINTYRE, MARY GARDINER JONES, DAVID S. DENNISON, JR., ANDREW C. GOODHOPE, Administrative Law Judge, *Appellees*.

Submitted April 12, 1973
Filed May 31, 1973.

Before LAY and STEPHENSON, Circuit Judges, and TALBOT SMITH, District Judge.*

STEPHENSON, Circuit Judge.

The Seven-Up Company appeals from the order of the District Court dismissing appellant's claim for lack of subject matter jurisdiction. Seven-Up sought below to enjoin the Federal Trade Commission from further action in its proceedings against Seven-Up, alleging that the administrative proceeding itself is fatally defective without the joinder of Seven-Up's 470 bottlers as indispensible parties.

Seven-Up, along with several other major soft drink manufacturers,[1] has been charged by the FTC with using

* Eastern District of Michigan, sitting by designation.

[1] The manufacturers were charged in separate complaints.

an unfair method of competition through its license agreement with bottlers whereby the bottlers agree not to sell outside of designated geographical areas. Seven-Up moved to dismiss the administrative complaint, claiming that the bottlers are indispensible parties since they have important contract rights which are at stake in the proceedings. The motion to dismiss was denied by the Hearing Examiner whose order was then upheld by the Commission.[2] Seven-Up then petitioned the District Court for both injunctive and declaratory relief.

The Coca-Cola Company and PepsiCo., Inc., other respondents in the FTC proceedings, have both unsuccessfully presented the identical claim to the Fifth and Second Circuits. *The Coca-Cola Company* v. *FTC*, —F.2d— (CA5 No. 72-2270 February 15, 1973) and *PepsiCo., Inc.* v. *FTC*, 472 F.2d 179, (CA2 1972). We particularly agree with the reasoning of the Fifth Circuit and likewise hold that the action was properly dismissed for lack of subject matter jurisdiction.

Federal Courts have traditionally declined to interfere with on-going agency proceedings under the doctrine requiring exhaustion of administrative remedies. See, *McGee* v. *United States*, 402 U.S. 479 (1971); *McKart* v. *United States*, 395 U.S. 185 (1969) and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52 (1938). Furthermore, Congress has here specified a statutory scheme which contemplates judicial review of cease and desist orders issued

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[2] While we do not reach the merits of the indispensible party issue, we note that joinder question also contains a dispute as to the underlying facts. The Hearing Examiner allowed any of the 470 bottlers to intervene if they so wished. One intervened. Seven-Up, however, asserts that this right to intervene was "limited" and insufficient. The FTC disagrees. *See, e.g., PepsiCo., Inc. 1. F.T.C.*, 472 F.2d 179, 183-184 (CA2 1972).

by the FTC exclusively by a court of appeals. 15 U.S.C. §§45(c) and (d) provide in pertinent part that:

> (c) Any person, . . . required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, ...
>
> (d) . . . the jurisdiction of the court of appeals . . . shall be exclusive.

This is fully in harmony with § 10(c) of the Administrative Procedure Act. See 5 U.S.C. § 704 and *Coca Cola, supra,* at Slip Op. 4.

The statutory provisions for review, however, have been held not to preclude district court review under *all* circumstances. *See Elmo Division of Drive-X Co.* v. *Dixon,* 348 F.2d 342, 343 (CA D.C. 1965) and *PepsiCo, supra,* at 185. *Compare, Coca-Cola, supra,* at Slip Op. 4-5. It has been held that district courts have jurisdiction to grant relief during agency proceedings which are not yet final in certain specific instances. These include, (1) where agency has acted in excess of its delegated powers or contrary to a specific statutory mandate. *Leedom* v. *Kyne,* 358 U.S. 184 (1958); (2) where the proceedings involve questions of high national interest because of their international complexion. *McCulloch* v. *Sociedad Nacional de Marineros de Hondursa,* 372 U.S. 10 (1963) and (3) where the agency has clearly violated the constitutional rights of the party seeking prior restraint. *Fay* v. *Douds,* 172 F.2d 720 (CA2 1949). Seven-Up clearly has not brought itself within any of these exceptions to the rule against judicial review of interlocutory agency rulings.

Seven-Up further asserts, however, that the FTC's refusal to join the bottlers as parties in its proceedings amounts to "final agency action for which there is no other adequate remedy in court" under the Administrative

Procedure Act. 5 U.S.C. § 704. We disagree, for while the Commission's ruling on Seven-Up's motion at the most amounts to final agency action on the joinder issue, judicial review by a court of appeals can clearly be had once the Commission's proceedings are concluded. 5 U.S.C. § 704 goes on to provide that an interlocutory agency ruling is "subject to review on the review of the final agency action." Neither are we convinced that the absence of the bottlers as parties renders the proceedings so fundamentally defective that immediate judicial relief is required. As the Fifth Circuit stated *Coca-Cola,* at *Slip Op.* 8-9.

> The extraordinary remedy of judicial intervention in agency proceedings still in process is unavailable unless necessary to vindicate an unambiguous statutory or constitutional right, and only when this condition is satisfied will a court look to the general body of equitable jurisprudence and other appropriate sources for the purpose of fashioning relief. To adopt the plaintiffs' position, on the other hand, would be to make the rule that judicial intervention to "correct" an interlocutory agency ruling is available wherever an agency ruling differed from some equitable maxim.

We conclude that Seven-Up must await a cease and desist order by the FTC, if such is ever to be issued, before jurisdiction will lie for a review of the interlocutory ruling it challenges.[3]

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[3] We reject as without merit Seven-Up's contention that the standard of review on the joinder question, once the agency proceedings are completed, will necessarily be more stringent.

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

THE SEVEN-UP COMPANY, a corporation of the State of Missouri, *Plaintiff*

vs.

ANDREW C. GOODHOPE, Hearing Examiner; MILES W. KIRKPATRICK, Chairman; PAUL RAND DIXON, Member; A. EVERETTE MACINTYRE, Member; MARY GARDINER JONES, Member, and THE FEDERAL TRADE COMMISSION, *Defendants.*

No. 72 C 285 (2)

Order

Presently pending before the Federal Trade Commission is a proceeding charging plaintiff, a soft drink manufacturer, with engaging in unfair methods of competition in violation of the Federal Trade Commission Act, 15 U.S.C., Section 45, by reason of provisions in licenses granted to its bottlers whereby the bottlers agree not to sell the product outside of a designated geographical territory. Similar complaints were filed and are pending against other soft drink manufacturers, including Coca Cola and Pepsi Cola. Plaintiff moved to dismiss the Commission proceedings on the ground of non-joinder of plaintiffs' many bottlers as indispensable parties.

This action for injunctive and declaratory relief challenges the proprietary of the interlocutory order of the Commission denying the motion to dismiss. Similar orders in the Coca Cola and Pepsi Cola proceedings have been unsuccessfully attacked in other United States District Courts. See *The Coca-Cola Company* v. *Federal Trade*

Commission, Northern District of Georgia, 342 F.Supp. 670, and *PepsiCo, Inc.* v. *Federal Trade Commission,* Southern District of New York, 343 F.Supp. 396. Appeals have been taken from both rulings.

Defendants have moved to dismiss, or in the alternative for summary judgment. Plaintiff has moved for summary judgment. After full consideration, we agree with the rationale of the district court rulings in the Coca Cola and Pepsi Cola cases dismissing the complaints therein for lack of subject matter jurisdiction.

Accordingly, IT IS HEREBY ORDERED that the defendants' motion to dismiss be and the same is hereby SUSTAINED and the complaint is dismissed for lack of subject matter jurisdiction. Plaintiff's motion for summary judgment is denied.

Dated this 12th day of September, 1972.

United States District Judge
Signature Unreadable

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:
Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

DOCKET No. 8853

In the Matter of
CRUSH INTERNATIONAL LIMITED, a corporation;
BEVERAGES INTERNATIONAL INC., a corporation;
CRUSH INTERNATIONAL INC. a corporation.

DOCKET No. 8854

In the Matter of
DR. PEPPER COMPANY, a corporation.

DOCKET No. 8855

In the Matter of
THE COCA-COLA COMPANY, a corporation;
COCA-COLA BOTTLING CO. (THOMAS), INC., a corporation;
COCA-COLA BOTTLING WORKS (THOMAS), INC.,
a corporation; and
COCA-COLA BOTTLING WORKS 3rd, Inc., a corporation.

DOCKET No. 8856

In the Matter of
PEPSICO, INC., a corporation

DOCKET No. 8857

In the Matter of
THE SEVEN-UP COMPANY, a corporation.

DOCKET No. 8859

In the Matter of
NATIONAL INDUSTRIES INC., a corporation; and
COTT CORPORATION, a corporation.

Order Ruling on Motions to Dismiss for Failure to Join Indispensable Parties

This matter is before the Commission upon requests for permission to file interlocutory appeals by the respondents in Docket Nos. 8853-8857 and Docket No. 8859, upon complaint counsel's response thereto, filed February 17, 1972, and upon respondent Dr. Pepper Company's response to complain counsel's reply, filed February 29, 1972.[1] Although the motions are not identically styled and vary somewhat in the specific relief sought, they nevertheless involve the same question and will therefore be considered together.

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[1] The motions are as follows: Crush International Limited, Docket No. 8853—application for leave to file an interlocutory appeal or to treat as certified February 4, 1972; Dr. Pepper Company, Docket No. 8854—request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motions to dismiss the complaint for failure to join indispensable parties and for a stay of proceedings, and request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to amend the complaint to join the Dr. Pepper Company bottlers as co-respondents filed February 4, 1972. The Coca-Cola Company, Docket No. 8855—application (I) for leave to file interlocutory appeals and (II) to treat motions to dismiss as certified filed January 18, 1972; Pepsico, Inc., Docket No. 8856—application for leave to file interlocutory appeal or to treat motions as certified filed January 31, 1972; The Seven-Up Company, Docket No. 8857—application for permission to file (1) appeal for de novo consideration of respondent's motions to dismiss, or (2) interlocutory appeal filed January 31, 1972; National Industries, Inc., Docket No. 8859—respondents' request for prmission to file interlocutory appeal from the hearing examiner's order denying motion to dismiss the complaint for failure to join indispensable parties filed February 3, 1972.

The question arises as a result of complaints issued by the Commission against several soft drink companies challenging the legality of respondents' contracts with their respective bottlers. Respondents take the position that their bottlers are indispensable parties to these proceedings and that absent their joinder the complaints should be dismissed. Motions to this effect were denied by the examiner and these requests for permission to appeal followed. Before considering these requests we will deal with the procedural issues of the examiner's authority to rule on a motion to amend the complaint by the addition of parties to Commission proceedings and his authority to rule on motions to dismiss.

I

The Commission has consistently taken the position that the examiner has no authority to amend a complaint by the addition or deletion of parties except to the extent that his ruling deals with matters of procedure rather than substance such as the deletion of an individual respondent who has deceased or the substitution of respondents improperly named, etc. The same applies to motions to dismiss because both involve the "reason to believe" concept of Section 5 which only the Commission itself can express. Both issues were involved in the *Suburban Propane Gas Corp.* case Docket No. 8672 Order Ruling on Interlocutory Appeals, May 25, 1967, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶ 17,965. On the issue to amend the complaint by a joinder of an additional party we there held that it should have been certified to the Commission. As to the motion to dismiss we stated as follows:

> "The examiner recognized that the question involved the administrative discretion in issuing a complaint and that it presented an issue on which he had no authority to rule. Nonetheless, he denied the motion. The matter should have been certified to the Commis-

sion with the examiner's recommendation. Section 3.6(a), Commission's Rules of Practice; Drug Research Corp., Docket No. 7179 (October 3, 1962). [Footnote omitted] Respondent, however, has not been prejudiced, since the matter is now before the Commission for *de novo* consideration and determination." at 20,337.

The Commission has made a distinction however, between those instances in which the motion to dismiss challenges the Commission's legal power to issue the complaint and those in which it seeks to probe the Commission's discretion or judgment on whether or not a proceeding would be in the public interest. It is only in the latter instance in which the examiner is considered to be without authority to rule. See, *The Drive-X Company, Inc.*, Docket No. 8615, Order Denying Application for Leave to File Interlocutory Appeal or in the Alternative for an Order Requiring Certification of Question, June 10, 1964. While it is clear that the present situation falls within the former, *i.e.*, the category of cases challenging the Commission's legal authority to issue the complaint, and hence within the examiner's authority to decide, we have nevertheless determined that that question is so intertwined with the question of amending the complaint by the addition of parties that both should have been certified to the Commission.

Although the matter has not been so certified, we are not precluded from considering it, since it is before us upon respondents' request for leave to file interlocutory appeals. A similar procedure was followed in *Maremount Corp.*, Docket No. 8763, Order Denying Respondent's Request to File Interlocutory Appeal and Motion to Dismiss the Complaint or Stay Proceedings, October 3, 1968, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶ 18,542. There we held as follows:

"Respondent argues first that the examiner erred in ruling on the motion, which it asserts to be beyond his

jurisdiction, and, secondly, that its request is justified on the merits. We agree that the hearing examiner erroneously ruled on the request to dismiss the complaint or stay the proceeding. The motion clearly is addressed to the Commission's administrative discretion and does not concern adjudicative factfinding functions delegated to hearing examiners. *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order issued October 15, 1964). The hearing examiner should properly have certified this part of respondent's motion to the Commission for the Commission's determination and action. Nevertheless, in view of respondent's application for permission to file an interlocutory appeal, the matter is now before the Commission in the same posture as it would have been had the examiner certified it. Accordingly, while our holding is that the hearing examiner erred in failing to certify the motion, this in the circumstances was not to respondent's prejudice and the motion will now be treated as though it has been properly certified." at 20,889.

We will follow this procedure in the instant proceeding. At the same time we will consider the examiner's ruling as his recommendation to the Commission for the disposition of this matter.

II

The question presented for our decision is whether respondents' bottlers who are parties to the contract being challenged by the complaint are indispensable parties to this proceeding. In essence the position urged upon us by the respondents is that an adjudication of these contracts involves substantial rights of the bottlers who, over the years, have expended goodly sums of money in the development of their business operations in reliance on the terms of their contracts and hence due process requires that they be made a party so that they may be bound by the outcome

of this proceeding as well as protect their interests. Respondents are also concerned that the failure of joinder may subject respondents to multiple litigation with their bottlers and result in inconsistent future adjudications. Absent a joinder of the bottlers, respondents ask that the complaints be dismissed.

The examiner's ruling complained of contains the following statements:

> "It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondents have with their bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondents' trademarked products, it would be without recourse to sue the respondents for damages or for injunctive relief requiring them to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable.
>
> "As a practical matter, however, it is not feasible to join all of the respondents' bottlers as parties to this proceeding. In the first place, the large number of them (1186) would create a completely unmanageable situation for trial purposes. Secondly, it is presumed that a substantial number of such bottlers operate within a small territory within a state, and consequently, may well not be engaged in commerce thereby depriving the Commission of jurisdiction over such bottlers." Order Denying Motion to Dismiss the Complaint for Nonjoinder of Indispendable Parties, January 7, 1972, pages 3-4.

The examiner was guided in his decision by Rule 19 of the Federal Rules of Civil Procedure and *Provident Bank* v.

Patterson, 390 U.S. 102 (1968) a case interpreting the requirements of Rule 19.

Traditionally, of course, antitrust proceedings and decrees have taken little, if any, notice of third parties to any contract held to be in contravention of one of the antitrust laws perhaps because the vindication of public rights, even though they run counter to contractual rights between defendants and third parties, may be accomplished without joining these third parties. This reasoning is advanced by Professor Moore in 3A MOORE'S FEDERAL PRACTICE, Section 19.10 at 2344. Respondents invite attention to two 1921 proceedings involving this Commission which allegedly support the proposition that the complaint should be dismissed for failure to join indispensable parties. The first is *Fruit Growers' Express Inc.* v. *F.T.C.*, 274 F. 205 (7th Cir. 1921) in which the court vacated a Commission cease and desist order on the ground that the Commission was without jurisdiction because the facts involved common carriers who are within the sole jurisdiction of the Interstate Commerce Commission. The second is *Sinclair Refining Co.* v. *F.T.C.*, 276 F. 686 (7th Cir. 1921), in which the failure to join what the reviewing court considered to be an indispensable party was advanced as one of the reasons for setting aside an order to cease and desist *after* the court had decided that no violation had been shown. Neither case can be considered a viable precedent for the proposition advanced here. Moreover, a subsequent decision by the same court specifically upheld the Commission's view and with specific reference to these two decisions *Automatic Canteen* v. *F.T.C.*, 194 F.2d 433 (7th Cir. 1952), *rev'd in part on other grounds*, 346 U.S. 61 (1953). Finally, the courts in a procession of decisions have failed to join or otherwise consider indispensable third parties to a contract the legality of which was being challenged under the antitrust laws. See, *United Shoe Machinery Corp. v. U.S.*, 258 U.S. 451 (1922); *U.S.* v. *Paramount Famous Lasky*

Corp., 282 U.S. 30 (1930); *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208 (1939); *U.S.* v *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *U.S.* v. *National Lead Co.*, 332 U.S. 319 (1947); *U.S.* v. *Schine Theatres, Inc.*, 334 U.S. 110 (1948); and *U.S.* v. *International Boxing Club of New York, Inc.*, 171 F. Supp. 841 (S.D.N.Y. 1957), *aff'd* 348 U.S. 242 (1959). The last time this Commission had to consider this question was in *L. G. Balfour Co.*, Docket No. 8435, July 29, 1968, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶ 19,485 in which it came to the same conclusion. In *Eastman Kodak Co.*, Docket No. 6040, similar arguments were advanced with respect to the challenged resale price maintenance contracts Kodak had with over 6,000 retailers. What we said there is pertinent here:

> "It is true that if an order prohibiting respondent from fixing and maintaining resale prices in accordance with its agreements with these dealers is issued, it would affect their contractual rights. However, no such prohibition will be issued herein unless the Commission determines that these agreements are in unreasonable restraint of trade and should not be continued. The courts have regularly struck down systems deemed violative of the antitrust laws even though such systems included leases, licenses and other forms of agreements where the other parties thereto were not clearly of benefit to said other parties." Order Disposing of Motion to Strike and Respondents' Motion to Dismiss, September 25, 1953.

It is well established, therefore, that third parties to a contract the legality of which is being challenged under the antitrust laws need not be joined in a suit against the first party and are thus not considered indispensable parties. In *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940) the court observed that "in proceedings before the Federal Trade Commission, the order restraining unfair methods of competition may preclude the performance of outstand-

ing contracts by the offender. Such orders have never been challenged because the holders of the contracts were not made parties." at 366. In light of the foregoing we believe respondents' claim that due process requires the joinder of the bottlers as indispensable parties and absent that, a dismissal of the complaints, to be without merit.

Respondents also assert that the failure to join the bottlers may subject respondents to the risks of multiple litigation and inconsistent future adjudications. Our own understanding of the applicable legal principles leads us to conclude that such a eventuality is highly unlikely. A contract which has been decleared illegal cannot be enforced by either party.

> "A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value. . . ." *Restatement of Contracts,* Section 598 (1932).

Similarly, supervening illegality renders a contract unenforceable even if it was legal when entered into. *Restatement of Contracts,* Section 548. In this regard, administrative proceedings are considered to have the same effect as do statutory provisions.

> "Clearly prevention by an executive and administrative order designed for the benefit of the general public may be considered excusable impossibility whether the order is directed to the general public or to an individual." 6 *Williston on Contracts,* Section 193 (Rev. Ed., 1938).

We turn now to the question of whether, by using Rule 19 of the Federal Rules of Civil Procedure, a different result would be dictated. The Federal Rules of Civil Procedure are not, of course, applicable to administrative agency proceedings which are governed by their own rules of practice. Nevertheless, they can provide an analytical

framework for the disposition of related issues. Rule 19(a) provides that:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

As to (1), it is clear that depending on the outcome, complete relief can be accorded in this proceeding without joining the bottlers. Should the allegations of the complaint be upheld, the relief sought by the order, the termination of the exclusive territorial contracts, can be accomplished by an order to cease and desist naming the presently named respondents. The second part of Rule 19(a) is divided into two parts—an unprotected interest and a substantial risk of incurring inconsistent obligations in relation to that interest. If, however, that interest is not a legally protected one, as for example rights pursuant to a contract declared illegal under the antitrust laws, it cannot serve as a basis for a joinder of allegedly indispensable parties. The fact that a contract may have previously not been illegal does not alter this result. The Commission was created for, among others, the purpose of prohibiting hitherto unchallenged trade restraints. *F.T.C.* v. *Sperry & Hutchinson Co.*, — U.S. —, 1972. As for the risk of incurring inconsistent obligations due to the failure to join the bottlers, Rule 19 requires that risk to be substantial before it will be considered as a reason for a joinder of additional parties. As we have

mentioned above, that risk cannot be considered substantial. Our review of the applicable case law convinces us that the bottlers are not indispensable parties within the meaning of Rule 19. See, *e.g. Bennie* v. *Pastor*, 393 F.2d 1 (10th Cir. 1968), citing *Schields* v. *Barrow*, 58 U.S. (17 How.) 129 (1854) and *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968); *Chiodo* v. *General Waterworks Corp.*, 380 F.2d 860 (10th Cir. 1967), *cert denied*, 389 U.S. 1004; *Stevens* v. *Loomis*, 334 F.2d 775 (5th Cir. 1964).

III

One final aspect of this matter need be considered. In its request, the Coca-Cola Company points to *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, 269 F.796 (D.Del. 1920) as supportive of its position. There, in a dispute over the contract, the court found these exclusive territorial contracts to be lawful and as not "having an affect or intended to have an effect to defeat or lessen competition or to encourage or tend to create a monopoly, nor do I find anything therein that may be said to be in unreasonable restraint of trade." at 814. We have carefully reviewed that decision and conclude that it does not support respondent Coca-Cola's position.

IV

A number of the respondents have requested the opportunity for oral argument. Under the circumstances, we do not believe that an oral argument would serve any useful purpose. Accordingly,

It Is Ordered that the motions to dismiss for failure to join indispensable parties be, and they hereby are, denied.

By the Commission.

/s/ Charles A. Tobin
Charles A. Tobin
Secretary

SEAL
Issued: March 23, 1972

APPENDIX D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 8857

In the Matter of
THE SEVEN-UP COMPANY, a corporation

Order Denying Motion to Dismiss the Complaint for Nonjoinder of Indispensable Parties

Respondent by its counsel, has filed a motion to dismiss the complaint for nonjoinder of its 470 bottlers, all of whom it contends are indispensable parties to this proceeding. Respondent alleges that pursuant to the provisions of its exclusive bottling appointment agreements, each of respondent's bottlers has acquired the exclusive right in a defined territory to bottle and distribute soft drinks sold under respondent's registered trademarks. Respondent asserts that in reliance on these agreements its bottlers have invested many millions of dollars over the years in plants equipment and distribution facilities for the manufacture and sales of respondent's products and in creating, developing and maintaining markets for such products. The respondent asserts that its bottlers have each acquired a valuable vested property right in such contract provisions which have heretofore been recognized as lawful and reasonable ancillary restraints accompanying valid trademark licenses and that to invalidate such provisions would result in many of the bottlers being forces out of business and deprived of valuable investments and property rights and would constitute a denial of due process of law to respondent and to each of its bottlers.

Counsel in support of the complaint have filed an answer opposing the respondent's motion to dismiss.

Counsel for the respondent and in support of the complaint agree that while the Federal Rules of Civil Pro-

cedure are not binding upon the hearing examiner of the Commission, Rule 19 of such Rules supplies a practical framework within which to arrive at a decision on the questions presented by the respondent's motion.

Rule 19, in pertinent part, provides as follows:

"Rule 19. *Joinder of Persons Need for Just Adjudication*

"(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
of the action improper, he shall be dismissed from the action.

"(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can

be lessened or avoided; third, whether a judgment rendered in a person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." 28 U.S.C.A. 19 (1971 Cum. Annual Pocket Part).

It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondent has with its bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondent's trademarked products, it would be without recourse to sue the respondent for damages or for injunctive relief requiring it to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable.

As a practical matter, however, it is not feasible to attempt to join all of the respondent's bottlers as parties to this proceeding. In the first place, the large number of them (470) would create a completely unmanageable situation for trial purposes. Secondly, it is presumed that a substantial number of such bottlers operate within a small territory within a state, and consequently, may well not be engaged in commerce thereby depriving the Commission of jurisdiction over such bottlers.

In *Provident Bank* v. *Patterson,* 390 U.S. 102 (1967), the Supreme Court considered the present revised Rule 19. In that case, after a verdict had been obtained in the District Court, the Circuit Court of Appeals dismissed the action on the ground that an indispensable party had not been made a party to the action. The question of indispensable parties was raised for the first time in the Circuit Court of Appeals. The Supreme Court reversed, since the Circuit Court failed to "follow the provision of Rule 19 of the Federal Rules of

Civil Procedure that findings of 'indispensability' must be based on stated pragmatic considerations." (at p. 106) The Supreme Court held that the question of indispensable party was not a substantive right unaffected by the Federal Rules of Civil Procedure. The Court pointed out that the principal consideration is whether or not it is "feasible" to join a party and that the decision of whether or not to join a party pursuant to Rule 19 requires the applying of the equity and good conscience test of Rule 19(b) (at p. 109).

In a number of antitrust cases, it has been recognized by the Supreme Court that the courts possess the power to strike down "systems deemed violative of the anti-trust laws even though such systems include leases, licenses, and other forms of agreements, and the lessees, licensees, and other parties to the agreements (are) not before the Court." *U.S.* v. *National Lead Co.*, 63 F. Supp. 513, 525, n. 8 (S.D.N.Y. 1945), affirmed, 332 U.S. 319 (1947). See also, *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940).

Consequently,

It Is Ordered that the respondent's motion to join all of its bottlers as being indispensable parties to this proceeding is hereby denied.

/s/ Andrew C. Goodhope
Andrew C. Goodhope
Hearing Examiner

January 21, 1972

APPENDIX E

Constitutional Provisions, Statutes and Rules Involved

UNITED STATES CONSTITUTION

AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

JUDICIAL CODE

28 U.S.C. §1331(a). Federal question; amount in controversy; costs

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C. §1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer

or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. §1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. §704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

FEDERAL TRADE COMMISSION ACT

15 U.S.C. §45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices.

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requir-

ing a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provided that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person or advertising offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in

paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 227(a) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding, by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon

good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission, may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act of practice in question was used or where such person, partnership, or corporation resides or carried on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court of the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such

terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the resi-

dence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the Court of Appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the Court of Appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such peition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate," in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action

brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect shall be deemed a separate offense.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he had not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judg-

ment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reason for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

FEDERAL TRADE COMMISSION

RULES OF PRACTICE

16 C.F.R. §3.22. Motions

(a) Presentation and disposition. During the time a proceeding is before an Administrative Law Judge, all motions therein, except those filed under §3.42(g), shall be addressed to the Administrative Law Judge, and if within his authority shall be ruled upon by him. Any motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission with his recommendation. All written motions shall be filed with the Secretary of the Commission and all motions addressed to the Commission shall be in writing.

(b) Content. All written motions shall state the particular order, ruling, or action desired and the grounds therefor.

(c) Answers. Within ten (10) days after service of any written motion, or within such longer or shorter time as may be designated by the Administrative Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked

for in the motion. The moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission.

(d) Motions for extensions. As a matter of discretion, the Administrative Law Judge or the Commission may waive the requirements of this section as to motions for extensions of time, and may rule upon such motions ex parte.

(e) Rulings on motions for dismissal. When a motion to dismiss a complaint or for other relief is granted with the result that the proceeding before the Administrative Law Judge is terminated, the Administrative Law Judge shall file an initial decision in accordance with the provision of §3.51. If such a motion is granted as to all charges of the complaint in regard to some, but not all, of the respondents, or is granted as to any part of the charges in regard to any or all of the respondents, the Administrative Law Judge shall enter his ruling on the record and take it into account in his initial decision. When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a prima facie case, the Administrative Law Judge may, if he so elects, defer ruling thereon until the close of the case for the reception of evidence.

16 C.F.R. §3.23. Interlocutory appeal

Rulings of the hearing examiner on motions may not be appealed to the Commission prior to appeal from the initial decision except in the following circumstances:

(a) *Appeals without a determination by the hearing examiner.* The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the hearing examiner: (1) Requires the disclosure of Commission records or the appearance of an official or employee of the Com-

mission pursuant to §3.36; (2) requires the appearance of other Government officials pursuant to §3.37; (3) suspends an attorney from participation in a particular proceeding pursuant to §3.42(d); or (4) grants or denies an application for intervention pursuant to the provisions of §3.14. Appeal from such a ruling may be sought by filing with the Commission an application for review, not to exceed fifteen (15) pages, within five (5) days after notice of the hearing examiner's ruling. Answer thereto may be filed within five (5) days after service of the application for review. The application for review should specify the person or party taking the appeal; should designate the ruling or part thereof from which appeal is being taken; and should specify under which provisions hereof review is being sought. The Commission upon its own motion may enter an order staying the return date of an order issued by the hearing examiner pursuant to §3.36 or §3.37 or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

(b) *Appeals upon a determination by the hearing examiner.* Except as hereinbefore provided in paragraph (a) of this section applications for review of a ruling by the hearing examiner may be allowed only upon request made to the examiner and a determination by the examiner in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for defference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. Application for review in writing may be filed, not to exceed fifteen (15) pages, within five (5) days after notice of the hearing examiner's determination. Answer thereto may be

filed within five (5) days after service of the application for review. The Commission may thereupon, in its discretion, permit an appeal. Commission review, if permitted, will be confined to the application for review and answer thereto, without oral argument or further briefs, unless otherwise ordered by the Commission.

(c) *Proceedings not stayed.* Application for review and appeal hereunder shall not stay proceedings before the hearing examiner unless the examiner or the Commission shall so order.